

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**TLC HEALTH NETWORK, INC.  
D/B/A/ LAKE SHORE HEALTH CENTER,  
DEBTOR-IN-POSSESSION**

**and**

**Case 03-CA-113937**

**1199 SEIU UNITED HEALTHCARE WORKERS  
EAST**

**GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION**

## **INTRODUCTION**

This memorandum is submitted by Counsel for the General Counsel (the General Counsel) in support of its opposition to the exceptions of TLC Health Network Inc. (“Respondent”) to the decision of Judge Davis in Case 03-CA-113937. In his decision, Judge Davis correctly held that Respondent violated Section 8(a)(1) and (4) of the Act when it discharged Anna Galofaro for voting in a Board election. Respondent fails to set forth any adequate basis for overturning Judge Davis’ decision.

## **STATEMENT OF THE CASE**

A hearing was held on July 22, 2014 in Buffalo, New York. At that hearing, the General Counsel presented evidence showing that while Ms. Galofaro was a statutory supervisor, at the time she cast her ballot she was unsure of her supervisory status and believed she was eligible to vote. The record shows that while Ms. Galofaro’s manager, Steven King, instructed her and other supervisors that they were ineligible to vote, Ms. Galofaro reasonably believed that she was a member of the proposed bargaining unit. In this regard, Ms. Galofaro was informed by a representative of 1199 SEIU United Healthcare Workers East (“Union”) that she was eligible to vote subject to challenge.<sup>1</sup> The record also shows that although it knew of Ms. Galofaro’s intent to vote, Respondent did not raise the issue of her eligibility with the Union or the Board before she voted. After the election, the Union and Respondent disagreed as to whether Ms. Galofaro’s vote should be counted. The Respondent presented for the first time disciplines signed by Ms. Galofaro, and the Union agreed that on that basis, her vote should not be counted. The parties agree that Ms. Galofaro was at all relevant times a statutory supervisor.

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<sup>1</sup> Union Organizer Sandy Harmon testified that she received Ms. Galofaro’s name as part of a list of dietary employees which she received from another dietary employee. (Tr. 22). Ms. Harmon testified that none of the dietary employees she talked to referred to Ms. Galofaro as a supervisor. (Tr. 17).

On October 23, 2014, Judge Davis issued his decision (“ALJD”) holding that the Respondent violated Section 8(a)(1) and (4) of the Act when it discharged Ms. Galofaro for voting in the election. The Respondent took exception to Judge Davis’ legal conclusions and filed its memorandum in support of its exceptions on November 19, 2014.

### **ARGUMENT**

#### **I. Respondent failed to properly file exceptions pursuant to Section 102.46 of the Board’s Rules and Regulations.**

Section 102.46 of the Board’s Rules and Regulations (Rules) states that “...any party may file with the Board exceptions to the administrative law judge’s decision...together with a brief in support of said exceptions.” It also lays out, in Section 102.46(b)(1), the specific requirements for what must be included in an exception.

Each exception (i) shall set forth specifically the questions of procedure, fact, law or policy to which exception is taken; (ii) shall identify that part of the administrative law judge’s decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

While Respondent timely filed its brief in support of its exceptions, it failed to timely file, or to file at all, its actual exceptions as required by Section 102.46(b)(1) of the Rules. Section 102.46(b)(2) states that “[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.” Here, Respondent filed only its brief and failed to file any actual exceptions pursuant to Board’s Rules and Regulations. Accordingly, Respondent has failed to comply with the requirements of Section 102.46 in filing its exceptions. Because Respondent failed to comply with the Board’s requirements, its brief should be disregarded and the Board should adopt the ALJD.

**II. The ALJ correctly found that Respondent violated Section 8(a)(4) of the Act when it discharged Ms. Galofaro voting in a Board-conducted election.**

*a. Even an ineligible supervisor or employee has the right to cast a ballot*

The ALJ was correct in holding that Ms. Galofaro was protected when she cast a ballot in the election. (ALJD 9:4-5, 9:13-14, 10:40-41, 11:23-24). While Ms. Galofaro was a statutory supervisor when she voted, it is not uncommon for supervisors to vote under challenge. *Frey Mechanical Contractors*, 270 NLRB 348, 352 (1984); *Animal Trap Co. of America*, 107 NLRB 1193, 1193-94 (1954). Additionally, the ALJ distinguished between the right to vote and the right to have one's vote counted. (ALJD 9:12-14). An employee who is not on the Excelsior list may cast a challenged ballot which may later be excluded. For example, as happened here, the parties may agree after an election that a challenged individual is a supervisor. That individual's vote would not be counted. Here, when Respondent presented disciplines signed by Ms. Galofaro after the election, the Union agreed that her vote should not be counted. Notwithstanding that the parties agreed to exclude Ms. Galofaro, she nonetheless retained the right to vote in the first place. Accordingly, Respondent violated the Act by discharging her for voting.

It cannot be disputed that voting "lies at the core of the Section 7 right..." *Concrete Form Walls, Inc.*, 346 NLRB 831, 839 (2006). "The protection of Section 7 of the Act includes the right to vote by secret ballot in a Board-conducted election." *Lawson Printers, Inc.*, 159 NLRB 771, 775 (1966). The Board "has the 'responsibility to assure employees the 'fullest freedom' in the exercise of their right to participate in a Board-conducted election.'" *Citing* 29 U.S.C. § 159(b); *Magnum Transportation, Inc.*, 360 NLRB No. 129, slip op. at 1 (2014) (Member Miscimarra, concurring). That freedom to exercise the Section 7 right to vote extends to the right of a supervisor to at least cast her ballot where, like here, she believes that she is eligible to vote.

Where an individual is later determined ineligible, the solution is to exclude the ballot from the final tally, not termination for participating in the election process.

*b. Ms. Galofaro was protected by Section 8(a)(4) of the Act when she voted in an attempt to obtain a Board resolution of her supervisory status.*

Respondent misstates the law when it argues that supervisors, as members of management, enjoy none of the Section 7 rights enjoyed by employees. While it is true that supervisors are not generally protected by the Act, Section 8(a)(4) of the Act prevents an employer from “discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under this Act.” 29 U.S.C. §158(a)(4). That Section has been invoked to protect supervisors who “invoke or seek to invoke the Board’s processes.” *SNE Enterprises, Inc.*, 347 NLRB 472, 497 (2006), citing *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980); *General Services, Inc.*, 229 NLRB 940 (1977).

In *General Services*, a supervisor was unsure whether he was an employee or a supervisor. He filed a charge alleging that he was discharged for engaging in union activity. He later withdrew that charge, believing that the employer was going to rehire him. However, the employer refused to rehire him once it found out he had filed the charge. He filed a second charge again alleging that he was discharged for engaging in union activity. The Board found that he was a supervisor and dismissed his 8(a)(3) allegation, but held that the employer had violated Section 8(a)(4) by refusing to rehire him because he had filed the initial charge. Here, Ms. Galofaro was told by the Union that despite her job title she was eligible to vote because she had no ability to hire or fire individuals. (Tr. 28). Like the individual in *General Services*, Ms. Galofaro voted at least in part in an attempt to invoke a Board process, in this case the election process, to determine whether she was in fact a supervisor.

While Respondent is correct in stating that filing a charge and casting a ballot are two different things, it errs in its conclusion that the distinction is fatal to Ms. Galofaro's protection under the Act. As the ALJ properly stated, remedying unfair labor practices and conducting elections are both Board processes, and are in fact the two central missions of the Board. (ALJD 10:43-47). Section 8(a)(4) has been interpreted liberally by the Board "in order to fully effectuate the section's remedial purpose." *General Services, supra, citing NLRB v. Scrivener*, 405 U.S. 117, 124 (1972). As the ALJ noted, supervisors are protected when invoking the Board's processes because there is strong public policy in support of free and unimpeded access to the Board. (ALJD 10:20-25). *Hi-Craft Clothing Co., supra*; see also *Metro Networks*, 336 NLRB 63, 66 (2001).

Respondent attempts to analogize Ms. Galofaro's voting in the election to a supervisor engaging in union activities, and distinguish it from supervisors invoking Board processes. However the cases Respondent cites are not analogous to the case herein. Ms. Galofaro was not promoting a union when she voted in the election. The record shows that although she believed she was eligible to vote, she was unwilling to tell anyone how to vote and reluctant to disclose her feelings on how she would vote. Further, unlike the cases cited by Respondent, Ms. Galofaro did not engage in behavior that could be termed disloyal or insubordinate. She encouraged employees to attend both the Union and Respondent's meetings so that they could make up their own minds. (Tr. 54-55). Allowing an employer to discharge a supervisor for participating in a Board process would not fully effectuate the Act. It would allow an employer, and not the Board, to determine who had access to the Board's processes.

c. *Ms. Galofaro's voting did not subject Respondent to substantial legal risk.*

Respondent argues that if the ALJ's decision is upheld, an employer would be in an impossible legal situation in that an employer could not prevent a supervisor from being present in the voting area, but could also not prevent an unfair labor practice charge on the basis of supervisory taint. Respondent's argument must fail on multiple points.

First, Respondent could have prevented Ms. Galofaro from voting. Ms. Galofaro testified that if she had been presented with anything in writing telling her not to vote, she would not have voted. She also testified that if she had been told she would get in trouble for voting, she would not have voted. (Tr. 38-41). Further, Respondent never raised the issue of her eligibility with the Board or the Union prior to the election. Had Respondent done so, the issue of Ms. Galofaro's supervisory status would have been resolved prior to the election, and she would not have had to resort to the election process as a mechanism to clarify her Section 2(11) status. Manager King was aware that Ms. Galofaro believed she could vote. Respondent had notice of Ms. Galofaro's intent to vote because it knew Ms. Galofaro had been urging other supervisors to vote on the belief that they were in fact eligible. She also attended a meeting held by Respondent for eligible voters. (Tr. 52-54). Yet Respondent never brought up Ms. Galofaro's eligibility with the Union or the Board. It waited until after Ms. Galofaro had voted to protest her eligibility.

Second, Respondent argues that Ms. Galofaro's voting opened it up to an unfair labor practice charge from the Union and the possibility of the election being set aside.<sup>2</sup> Respondent relies on *Longs Drug Stores Cal., Inc.*, 347 NLRB 500 (2006) and *Smithfield Packing Co.*, 344 NLRB 1 (2004) to support its contention that Ms. Galofaro's entrance into the voting area to cast

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<sup>2</sup> It is hard to imagine what possible objection the Union could have raised to Ms. Galofaro casting a ballot when her belief that she was eligible came as the direct result of what she was told by the Union itself.

her ballot opened Respondent up to an unfair labor practice charge, or the election being set aside. This reliance is misplaced. Neither case is analogous to the facts here.

In *Longs Drug Stores*, the respondent's lead personnel stood close to the voting line for an hour, making disparaging comments about the union and suggesting the employees vote 'no'. The Board found that "their obstructive intent was patently obvious." *Longs Drug Stores*, 347 NLRB at 512. In *Smithfield Packing Co.*, the employer's human resources director left the company and then returned specifically to aid the anti-union campaign. On the day of the election he entered the voting area six times, for 20-30 minutes at a time, speaking with the observers, for no apparent reason. He was known to the voting employees as the former human resources director and the employees knew he spoke for the employer concerning the union campaign. The Board found that "his conduct would tend to interfere with employee free choice in the election." *Smithfield Packing Co.*, 344 NLRB at 12.

In the instant case, Ms. Galofaro was not interested in swaying any of the employees' votes in any direction. She made it clear to the Respondent that she did not want to give employees her opinion on how to vote. (Tr. 31). She also made clear that she encouraged the employees to attend the Respondent's meetings on the subject so they could get all the information they needed to make an informed decision. (Tr. 30-32, 53-54). With respect to her conduct at the election, the record demonstrates that Ms. Galofaro arrived at the hospital, went and cast her challenged ballot, and then immediately left the voting area. She did not engage in conversation with other voters.<sup>3</sup> (Tr. 34-35). Respondent presented no evidence to show that any employee was intimidated or even concerned about her presence. Ms. Galofaro's intent was not

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<sup>3</sup> Although she wore her badge that identified her as a supervisor, Ms. Galofaro testified that there weren't many employees people around because it was close to the start of the shift. She asked one fellow employee where to go to vote, but did not talk to any others. Immediately after voting she left the polling area and went to clock in. (Tr. 34-35.)



to disturb the election – it was to participate in it. As stated above, Ms. Galofaro left the voting area immediately after voting and went to work her shift. She did not return to the voting area until the election ended and the ballots were being counted. Ms. Galofaro’s conduct in entering the polling area, voting, and immediately leave the area is far from the type of conduct Respondent relies on in *Longs Drug Stores* and *Smithfield Packing*.

**III. The ALJ correctly found that Respondent’s discharge of Ms. Galofaro violated Section 8(a)(1) because it interfered with the Section 7 rights of employees to vote.**

While Ms. Galofaro’s activities did not interfere with employee free choice, the Respondent’s decision to discharge Ms. Galofaro did. Ms. Galofaro voted in an election held on August 29, 2013. She was suspended without pay on August 30, 2013 and discharged on about September 6, 2013, one week after her suspension. (Tr. 76). At no time after her suspension did she return to work. Significantly, there were other elections in the same hospital scheduled for September 6, 2013. Thus, Ms. Galofaro was suspended without pay for voting in a Board election during the week preceding the September 6 election, and was terminated for the same reason that very day. Respondent effectively discharged Ms. Galofaro for voting before the final election was held. As the ALJ correctly noted, if an employer were allowed to discharge a supervisor for voting, employees who are not sure of their voting eligibility might refrain from voting for fear of being discharged, even if it turns out they were eligible to vote. (ALJD 12:22-26). The ALJ was correct in holding that Respondent’s action constituted a violation of Section 8(a)(1) of the act for interfering with employees’ right to vote. (ALJD 12:34-35).

**CONCLUSION**

For the reasons set forth above, the General Counsel respectfully requests that Respondent’s exceptions be overruled and the Decision and Order adopted in full. Respondent failed to comply with the Board’s Rules and Regulations in filing its exceptions. Even so, Judge

Davis was correct in finding that that Respondent violated Section 8(a)(1) and (4) of the Act by terminating Ms. Galofaro for casting a ballot in a Board election. Consequently, Respondent's exceptions to the ALJ's findings lack merit, and should be dismissed.

**DATED** at Buffalo, New York this 3<sup>rd</sup> day of December, 2014.

Respectfully submitted,

/s/Alicia E. Pender

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